

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins

Direct Dial: (202) 663-7823
E-Mail: wmullins@bakerandmiller.com

December 29, 2005

BY ELECTRONIC FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 34795

*Roquette America, Inc. - Petition for Exemption from 49 U.S.C. §10901 to
Construct a New Line of Rail in Keokuk, IA*

Dear Secretary Williams:

I am enclosing herewith Keokuk Junction Railway Co.'s reply to Roquette America Railway, Inc.'s Motion For Procedural Schedule in this matter. Please acknowledge receipt and filing of the accompanying reply by return receipt. If there are any questions concerning this filing, please contact me by phone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

cc: Daniel A. LaKemper
All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB FINANCE DOCKET NO. 34795

**ROQUETTE AMERICA, INC. - PETITION FOR EXEMPTION FROM 49 U.S.C. §10901
TO CONSTRUCT A NEW LINE OF RAIL IN KEOKUK, IA**

REPLY TO MOTION FOR PROCEDURAL SCHEDULE

**William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Phone: (202) 663-7820
Fax: (202) 663-7849**

Attorneys for Keokuk Junction Railway Co.

December 29, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB FINANCE DOCKET NO. 34795

**ROQUETTE AMERICA, INC. - PETITION FOR EXEMPTION FROM 49 U.S.C. §10901
TO CONSTRUCT A NEW LINE OF RAIL IN KEOKUK, IA**

REPLY TO MOTION FOR PROCEDURAL SCHEDULE

Keokuk Junction Railway Co. ("KJRY") hereby replies to the Motion For Procedural Schedule ("Motion") filed by Roquette America Railway, Inc. ("RARI"¹) in this proceeding. RARI's Motion requests the establishment of a procedural schedule in this matter. RARI's proposed schedule should be rejected. As an initial matter, and as set forth in KJRY's December 19th Reply, the proposed line construction project is not subject to approval of the Board under 49 U.S.C. §10901 and should therefore be denied or dismissed without further proceedings at the Board, making it unnecessary for the Board to set a procedural schedule in this proceeding at all.

Nonetheless, if the Board determines there is not enough information in the record at this time and desires to establish a proceeding as provided for in 49 U.S.C. §10502(b) in order to provide an opportunity for the parties to provide additional information to the Board, the proposed RARI schedule should be rejected. The proposed schedule would hide key facts and issues in this case by truncating discovery contrary to the Board's regulations and precedent. It would also force KJRY to submit its comments and evidence in a reply to the Roquette/RARI

¹ If, contrary to the title of this proceeding, RARI is the petitioner, then the petition apparently is not properly verified. Mr. Eric Tibbetts, who verified the Petition, identifies himself only as Logistics Department Manager of Roquette America, Inc. ("Roquette"). He does not state that he holds any position with RARI. For purposes of this proceeding and until further clarification, any reference to either RARI or Roquette is intended to be inclusive of both parties.

petition for exemption (“Petition”) before the petitioner(s) have fully presented their case-in-chief. If the Board determines to move forward, the Board should, instead, adopt the procedural schedule suggested in KJRY’s December 19 reply to the Petition (“Reply”).²

Summary of Pertinent Facts

On November 29, over five months after Roquette began its off-the-record discussions with the Board’s Section of Environmental Analysis (“SEA”), the Petition was filed seeking an exemption from the application requirements of 49 U.S.C. §10901 to construct new track at Roquette’s Keokuk, IA, plant. KJRY filed a first set of discovery, pursuant to 49 CFR §§1114.21 and 1121.2, on December 16, less than three weeks after the Petition was filed.

KJRY filed its Reply to the Petition on December 19; *i.e.*, the 20th day after the Petition was filed. KJRY’s Reply to the Petition suggested that the Petition should be rejected or dismissed, as the Petition did not establish that the proposed construction was subject to 49 U.S.C. §10901. KJRY also noted that it was still investigating its records for facts pertinent to the Petition. See KJRY’s Reply at 18-20.

On December 22, RARI filed the Motion. The Motion states that RARI will not respond to KJRY’s Reply at this time. Instead, RARI asks that the Board set a schedule under which the petitioner(s) would be required to respond only to KJRY’s first set of discovery, and thereafter KJRY would be given 25 days to supplement its December 19 reply, and the petitioner(s) would then respond 30 days later. The Board would then proceed to a finding on the merits of the Petition.

² KJRY’s Reply suggested that the Board, at a minimum, set a procedural schedule allowing 60 days for discovery, followed by successive periods of thirty days each for Roquette and KJRY to file a complete statement of their position on the legal and factual issues involved, plus time for rebuttal by Roquette if it desired such.

On December 23, RARI supplemented the Petition. The supplement purports to “more precisely identif[y] the location of the proposed construction relative to surrounding facilities.”

Discussion

Roquette has been working on its proposal for six months or more. It wasn't until the filing of the Petition that the public, including KJRY, was informed of even the briefest of details of the proposal. Under the Board's rules, KJRY had only 20 days to respond to the Petition, which it did on December 19. Based upon the record available to it, it was clear to KJRY that the line construction project was not the type of project that the Board could approve under Section 10901. KJRY therefore requested the Board to reject, deny, or dismiss the Petition at this time.

KJRY also noted that if the Board nonetheless determined to proceed with the Petition and to provide parties with further opportunities to comment, the Board should set a procedural schedule that would provide sufficient time for discovery and then opening comments, reply comments, and rebuttal comments. In the event this was the course chosen by the Board, KJRY filed an initial set of written discovery against Roquette in order to gather additional information. Rather than allow full discovery and an adequate investigation of the record, as proposed by KJRY, the Motion seeks to limit KJRY to this one set of initial discovery, which was formulated from less than three weeks' investigation, before moving to the merits of the Petition. The Motion also proposes that KJRY be required to submit a full explication of its position on the Petition before the petitioner(s) themselves would have to fully and adequately describe what is being proposed. Such a schedule would hamper informed decision-making by the Board, and should be rejected.

RARI's request that KJRY be limited to the one set of written discovery that it has already served is fundamentally unfair and inconsistent with the Board's discovery rules at 49

CFR Part 1114. Rather, the Board's rules do not limit discovery to one set of written discovery and instead provide for all relevant discovery and depositions. Such full discovery consistent with the Board's rules is certainly going to be required if the Board determines to establish a proceeding before moving the merits of the proposal. This is especially true given the large amount of time already provided to Roquette to develop and present its proposal, without a similar amount of time being provided to KJRY. Indeed, Roquette first met with the Board's environmental staff over six months ago about its plan to construct industry track and operate over KJRY's tracks in order to gain direct access to BNSF. Doubtless Roquette had worked on the plan for weeks or months prior to that meeting.³ At the same time, Roquette was misleading KJRY about Roquette's intentions for using the Hub Track to gain access to BNSF.⁴ In fact, when Roquette finally filed the Petition, it didn't even serve a copy on KJRY. It would be fundamentally unfair to deny KJRY the full use of the Board's discovery rules and processes, as adopting Roquette's petition would do, while providing Roquette with six months or more of preparation and analysis time.

In reality, the Motion is simply another attempt to further Roquette's pattern of trying to shield its proposal from scrutiny. By proposing to limit KJRY to a single set of written

³ Despite that amount of preparation time, Roquette just last week amended its presentation by filing its December 23 supplement.

⁴ See Appendix 2 to Verified Statement of J. Michael Carr in KJRY's Reply, an e-mail in which Roquette's Eric Tibbetts' (the witness who verified the Petition) told KJRY's Chief Financial Officer Mike Carr, "Roquette's interest in gaining a clear understanding of the ownership of the Hub Track has nothing to do with the question of BNSF access. Although I have not thought about it until you brought it up, I do not see any connection between the two. . . . Our interest in the Hub track relates to issues such as a unified on-site tank car wash." Mr. Tibbetts sent this e-mail 11 days after Roquette visited with Board staff to describe three construction options, including "a similar short construction . . . at the western end of RAI's plant, again involving a short build-out and crossing of KJR's track." See July 6 letter from Roquette's counsel to SEA, posted on the Board's website.

discovery requests based on KJRY's still-developing investigation of the facts, the Motion seeks to rush Roquette's proposal through without adequate examination. While KJRY believes there is enough information at this time for the Board to conclude that the line construction is not subject to Section 10901, KJRY is still reviewing its records and past dealings with Roquette, and with Roquette's predecessor, Hubinger. As that initial review has shown, there are substantial discrepancies between what Roquette claims and what KJRY claims, especially with respect to issues like ownership and leasing of various tracks, including the Hub Track; all of which would play an integral role in RARI's planned operations.

Given these outstanding and disputed issues, it is clear that if the Board determines to establish a proceeding, KJRY anticipates having to file a motion to compel discovery and to serve additional discovery in order to fully develop the record.⁵ Moreover, KJRY will need to depose Roquette witnesses to gain a greater understanding of Roquette's proposal. All of these actions are provided for in the Board's discovery rules. KJRY respectfully submits that it would be contrary to those rules for the Board to adopt the procedural schedule proposed by Roquette/RARI without allowing KJRY a full opportunity to pursue discovery consistent with those rules.

The Motion compounds the unfairness of RARI's plan to truncate discovery by proposing that KJRY, after receiving answers to its one set of written discovery, then submit its entire opposition to the proposed line construction project without the petitioner(s) having to first present a case-in-chief and without KJRY being able to fully avail itself of 49 CFR Part 1114. It is the petitioner(s) who have the burden to provide complete information to the Board and the

⁵ Indeed, contrary to Roquette's assertions of its desire to have a full and open discussion of the facts and the proposed project, on December 28, it objected to a substantial portion of KJRY's first set of discovery.

Board should establish a proceeding for the submission of additional information if they fail to do so. See 49 CFR §1121.4 and Expedited Procedures For Processing Rail Rate Reasonableness, Exemption And Revocation Proceedings, STB Ex Parte No. 527 (Sub-No. 2) (served June 25, 1999) (“Expedited Procedures”).

In this case, it is clear, initial jurisdictional issues aside, that there are substantial pieces of information left out of the Petition and that additional information is required to ascertain the scope of the project, its environmental impacts, its feasibility, and the various operating and safety issues involved. Adopting the procedural schedule proposed by RARI, in which Roquette would clarify its proposal only after KJRY had supplemented the record based upon answers to one set of initial written discovery, is not consistent with the Board’s regulations or with RARI/Roquette’s burden of going forward, as well as its ultimate burden of persuasion. See generally Consolidated Rail Corporation —Declaratory Order Proceeding, STB Finance Docket No. 34319 (served Oct. 10, 2003), slip op. at 7, and Consolidation Coal Sales Company v. Consolidated Rail Corporation, STB Finance Docket No. 34169 (served Feb. 28, 2002), slip op. at 4 (proponent of an affirmative defense in a complaint has the burden of going forward).

Rather, in this context and if the Board does not reject or dismiss at this stage, it is more consistent with the Board’s rules and precedents for the Board to adopt the procedural schedule proposed by KJRY. KJRY believes that a period of discovery limited to 60-90 days, an opening statement by Roquette in which it must set forth its prima facie case, a reply by KJRY, and then a rebuttal by Roquette. It is this schedule that provides for a complete investigation of the facts, the presentation of those facts by the party with the burden of persuasion, and then a reply to those facts. As such, if there is to be a proceeding at all, it is KJRY’s proposed procedural schedule that should be adopted, not Roquette’s. See generally Ameren Energy Generating Company—Construction And Operation Exemption—In Coffeen And Walshville, IL, STB Finance

Docket No. 34435 (served May 5, 2004)(establishing a proceeding so as to allow discovery and development of the record).

Conclusion

RARI's proposed procedural schedule would keep KJRY and the Board in the dark about Roquette's/RARI's proposal by truncating discovery contrary to the Board's discovery rules. It would also allow the petitioner(s) to put in a case-in-chief only after all of KJRY's comments and opposition are filed. Both of these features of the Motion are fundamentally unfair, are contrary to standard Board procedure, and are designed to shield the proposal from a thorough examination. Adopting RARI's proposed procedural schedule would frustrate, rather than foster, a full understanding and examination of the Petition. Accordingly, in the event the Board determines to establish a proceeding in this matter, the Board should adopt the schedule proposed in KJRY's Reply.

Respectfully submitted,



William A. Mullins
David C. Reeves
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Phone: (202) 663-7820
Fax: (202) 663-7849

Attorneys for Keokuk Junction Railway Co.

CERTIFICATE OF SERVICE

I, David C. Reeves, hereby certify that on this 29th day of December, 2005, copies of the foregoing reply have been served by first class mail, postage prepaid, or by more expeditious service, upon all parties of record.

A handwritten signature in black ink, appearing to read "David C. Reeves", written over a horizontal line.

David C. Reeves
Attorney for Keokuk Junction Railway Co.